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August 24, 1993

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AUG 24 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

Re: MM Docket No. 92-264

Dear Mr. Caton:

On August 23, 1993, Encore Media Corporation filed its Comments in the above-referenced proceeding. However, due to time constraints, those Comments did not contain a Table of Contents or Summary, notwithstanding that they were twelve pages in length.

Transmitted herewith are an original and four copies of a set of Comments which do contain the Table of Contents and Summary. The only other changes are the addition of the word "results" in line 7 of Page 11, and adding the letter "s" to the final word of the Conclusion.

It is requested that the enclosed Comments be substituted for those filed on August 23, 1993.

Should additional information be necessary in connection with this matter, please communicate with this office.

Very truly yours,

James A. Koerner
Counsel for
ENCORE MEDIA CORPORATION

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Enclosures

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Before the
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AUG 24 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	
Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	MM Docket No. 92-264
Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions	

COMMENTS OF ENCORE MEDIA CORPORATION

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AUGUST 23, 1993

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SUMMARY

In its Comments, Encore Media Corporation is seeking to clarify that the term/concept "multiplexing" is broader than the term/concept "time-shifting," and that "time-shifting" is but a subset of "multiplexing." Legislative history of the Cable Act, prior and contemporaneous press releases, and industry models fully support this requested clarification.

Secondly, Encore offers its rationale for treating premium multiplexed channels as a single channel when offered on a stand-alone basis consistent with previous offerings.

Thirdly, Encore supports the Commission's tentative conclusion that channel occupancy limits should apply only to programming services directly affiliated with the cable television operator.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions	)	

COMMENTS OF ENCORE MEDIA CORPORATION

Encore Media Corporation ("Encore Corp."), through undersigned counsel hereby submits its comments and request for clarification in response to the **Report & Order** and **Further Notice of Proposed Rule Making** ("Further Notice") in the above-captioned matter.

Encore Corp. owns and operates the video programming service known as "ENCORE," which commenced service in 1991. Encore Corp. selects and packages motion pictures from the 1960s, 1970s and 1980s, exhibiting them to multichannel video programming subscribers on an "a la carte" per channel basis. On May 25, 1993 Encore Corp. announced its plans to launch seven multiplex channels in 1994, each with its own thematic focus. Encore Corp. would be "vertically integrated" under the

broadcast attribution standard discussed in the Further Notice (¶201) and as such would be subject to the proposed channel limitations on those cable systems determined to have an attributable interest in Encore Corp. Accordingly, Encore Corp. is an interested person with standing to hereby comment.

Encore seeks to comment on three issues regarding the treatment of multiplex channels for channel limitation purposes. First, Encore Corp. requests the FCC to clarify that the term/concept "time shifting" is a subset of the broader construct of "multiplexing." Second, Encore Corp. encourages the FCC to count an individual programmer's multiplex channels as one. Third, Encore Corp. stresses its agreement with the FCC's tentative decisions to apply any channel limits only to programmers affiliated with the particular system operator.

I. TIME SHIFTING AND MULTIPLEXING ARE NOT SYNONYMOUS

A. The Legislative History Language Indicates That Congress Considered the Concept of Multiplexing to be Broad and Still Developing

In the multiplex discussion of its Further Notice, the FCC discusses the concept of "multiplexing" in a manner which could be interpreted to mean that "multiplexing" is synonymous with "time shifting."[1] The legislative history of the Cable

[1]For example, in paragraph 218 of the Further Notice the FCC, in response to various commenters' arguments that multiplexing provides "time diversity," refuses to exempt multiplex channels from channel occupancy limits on the basis that multiplexing does not further diversity of programming. Although we believe this is a narrow response, intended only to address the commenters' arguments, we are concerned that this response could be read, and misinterpreted, to mean that the FCC, like some commenters, considers the concepts "multiplexing" and "time shifting" to be interchangeable. Time shifting is the programming technique of scheduling the same programming on

Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, 106 Stat. 1460 (the "Act"), industry multiplex practices, and trade press articles show that time shifting is merely a subset of the much broader construct of multiplexing.

The Act's text neither addresses nor defines the term multiplexing. Indeed, the only Congressional reference to multiplexing is found in the Legislative History to the Act. Specifically, the House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. (1992) ("House Report") states at page 80:

> "The Committee also notes that some cable operators are experimenting with 'multiplexing' -- the offering of multiple channels of commonly-identified video programming as a separate tier (e.g., HBO1, HBO2, and HBO3). The Committee intends for these 'multiplexed' premium services to be exempt from rate regulation to the same extent as traditional single channel premium services when they are offered as a separate tier or as a stand alone purchase option." (emphasis added)

The House Report further provides at page 90:

> ". . . It is the intent of the Committee that '<u>multiplexed</u>' premium services such as HBO1, HBO2, and HBO3 also be excluded from the term 'cable programming service.' The Committee does not intend that the trend toward offering multiple channels of commonly-identified video programming, that traditionally or historically were offered on a per-channel or stand-alone basis, should result in an otherwise exempt service becoming subject to rate regulation." (emphasis added)

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different multiplex channels at different times.

It is noteworthy that neither the term, or the concept of time shifting are mentioned anywhere in the legislative history or the Act.

B. The Industry Multiplex Models In Existence Prior to Congress' Release of the House Report Shows that Time Shifting is Merely a Multiplex Subset

A review of the industry models of programming in existence when Congress formulated the multiplex exemption, and when the House Report was published, show that most existing forms of multiplexing are not time shifting.

In its deliberations, Congress used, as an example, the multiplexing of Home Box Office ("HBO"). The obvious reason for this choice is HBO's instant recognition. HBO's multiplexing strategy has always been to counter-program its multiplexed channels to the primary HBO channel as a means of targeting distinct audiences during the same daypart (e.g., male, female, kids, teens, etc.) and to offer more and different titles.

In April 1992, the Disney Channel multiplexed its service by launching DIS-2, which also provides greater variety of programming and counter-programming. In October 1991 Showtime multiplexed its service by launching SHO-2, a time shifted version of Showtime. Although MTV has not yet multiplexed, in July 1991 MTV announced plans to multiplex MTV by offering three additional genre specific music channels. Notably of the premium services that have actually multiplexed, only Showtime uses time shifting as its programming model. Most premium

services utilize other forms of multiplexing (i.e., thematic, genre or age specific).

Technically and theoretically, the HBO multiplexed programming and perhaps others are "time shifted" inasmuch as all of the programming on the multiplexed channels may be either produced or licensed by the umbrella programming company (e.g., HBO, Inc.) and exhibited on the primary channel (e.g., HBO) or its multiplexed channels. But, within any month (all premium services are monthly subscription services) time shifting is merely a by-product of exhibiting duplicated titles. Time-shifting is typically <u>not</u> the emphasis or means by which most programmers multiplex their programming.

As Congress uses HBO as <u>one</u> example of multiplexing, it is clear that it was looking at the industry usage of multiplexing in forming its multiplex exemption and in crafting the House Report language establishing the exemption. As Congress discusses the "trend toward offering [multiplex channels]" and the fact that "some cable operators are experimenting with multiplexing," it is clear that Congress intended that multiplex rights extend to existing services that were historically and traditionally offered on a per channel basis, but not yet multiplexed, and allowed for multiplex methods to vary based on individual programmer's discretion.

The House Report language indicates that in order to be exempted from rate regulation, the multiplex programming service must (1) be a premium service; (2) consist of multiple channels

of commonly-identified programming; and (3) have been traditionally or historically offered on a per-channel or stand-alone basis. The effective date of the Act is clearly the delineation to which the Committee must have been referring, since it could not have been Congress' intention that previously non-premium services could become exempt by future multiplexing. As the Committee noted, HBO clearly fits the description. As ENCORE was also a premium service offered on a stand-alone basis at the time, its multiple channels of commonly-identified programming also satisfy Congressional intent regarding multiplexing.

C. Articles Prior to the House Report Release Show That the Trade Press Considered Multiplexing to be Broader Than Time Shifting

An August 1991 multiplexing article regarding the Disney Channel stated that "The Disney Channel, however, has definite plans to program--not just time shift-- a separate feed to be beamed to several as yet unknown systems next March or April."[2] Moreover, articles regarding MTV stated that with respect to channel compression, "MTV's recent announcement of plans to 'multiplex' its offerings into three genre-specific music channels in 1993 is but the tip of the iceberg."[3] Additionally, an article regarding HBO's multiplex plans stated that "the

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[2]Cablevision, Video Triplets, August 12, 1991.

[3]TV Program Investor, July 31, 1991, p. 2 of 8. See also, New York Times, January 22, 1992, pp. D1, D5; Broadcasting, MTV Announces Its Move To Multiplexing, August 5, 1991; Cable World, MTV's 3-network plan signals coming battle for channel real estate, August 5, 1991.

primary HBO channel, for example, might air a film drama aired at an older audience, while 'HBO-2' simultaneously offers a teen-oriented comedy, and 'HBO-3' offers an original concert."[4] Regardless of the programming models these channels eventually constructed, it is evident that the cable industry, i.e., programming networks, the trade press, etc. recognize that there are various types of multiplexing in addition to time shifting.

D. FCC References to the Term/Concept Time Shifted are Without Basis

In the Commission's Rate Regulation Proceedings, the FCC used the phrase "multiplexed or time-shifted" in both its **NPRM** and **R&O**. As the FCC should have, and undoubtedly did, look to the legislative history of the Act for guidance on multiplexing, and the legislative history never uses the term time shifting, that reference should be read to denote time shifting as a subset or an example of multiplexing. Perhaps the FCC thought "time-shifting" was the predominant method in the multiplex experiments referenced by the House Report. In any event, it is clear that Congress never used the term time shifting and the FCC's references give no indication of why or how the FCC drew a connection between the two terms, without the necessary Congressional intent or mandate.

E. There are Numerous Possible Versions of Multiplexing

There are numerous possible versions of multiplexing. One form is according to the age of the product being offered, be it

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[4] PR Newswire, Home Box Office Plans Multiple Delivery of HBO and Cinemax, May 8, 1991.

movies, music videos, vintage commercials, or any other product. For example, a programmer could multiplex one channel per decade such as the 1960s, 1970s and 1980s.

A second multiplex form is according to the target audience. In this form, one multiplex channel could appeal to children, another to young adults, another to males and another to females.

A third multiplex form is, as Encore Corp. will soon offer, thematic. In this form, one multiplex channel is devoted to love stories, another to mystery, another to action, etc.

A fourth form of multiplexing is time-shifting. In this form, a particular movie may begin showing, for example at 7:00 p.m. on one multiplex channel, at 9:00 p.m. on another multiplex channel, and 11:00 on yet another multiplex channel. Time shifting plays virtually no role in the mix of the first three forms of multiplexing.

Accordingly, Encore Corp. requests that the FCC, in light of the above discussion, clarify for the record that multiplexing may be constructed in a number of forms in addition to time shifting.

II. MULTIPLEX CHANNELS SHOULD BE EXEMPT FROM FCC CHANNEL OCCUPANCY LIMITS

Multiplex channels should be exempt from channel occupancy limits because they provide substantial benefits to consumers, and the Act appears to contemplate such single channel count treatment. It appears that Congress intended multiplexed channels to count as a single channel. In exempting program

services from rate regulation, Congress exempted only per-channel and per program offerings. At page 80 of the House Report, quoted above, the Committee stated its intention that multiplexed channels be exempted to the same extent as traditional single channel premium services, (i.e., as a per-channel offering). This concept was emphasized by Commissioner Quello in his June 1993 NCTA speech. He stated that "by multiplexing Encore can create its own 'tier' and yet still be considered a 'per channel' service under the Act that should be exempt from rate regulation. The purpose of the channel limitation concept is to maximize the choices of programming for the viewer, at as reasonable a cost as possible.

In proposing to count "multiplexed" per channel offerings in the application of the 40 percent channel occupancy limitation (Further Notice, ¶218), the Commission overlooked substantial consumer benefits from the multi-faceted nature of multiplex and its many variations for cable television. The Commission's proposal to include multiplexed channels within the 40 percent limitation was based on the sole assessment of the consumer benefits of "time diversity" relative to program source

diversity.[5] Time diversity, however, is a consumer benefit resulting from but one form of multiplexing: time shifting.[6]

By assessing "multiplexing" solely within the limited context of the time shifting technique, the Commission ignored significant other consumer benefits from other multiplexing techniques. Encore Corp.'s Thematic Multiplex is a case in point. ENCORE's Thematic Multiplex is not premised on time diversity. In actualizing its "Mood on Demand" concept, Encore Corp. carefully selected and scheduled different programming for each multiplex channel. In order to do so, Encore Corp. licensed more than 2,500 movies and 3,500 series episodes from major studios and independent distributors through the year 2000.

III. CHANNEL OCCUPANCY LIMITS SHOULD APPLY ONLY TO PROGRAMMING NETWORKS AFFILIATED WITH THE CABLE SYSTEM OPERATOR

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[5]The Commission articulated the following rationale:

> We also disagree with commenters who argue that multiplexed channels should not be counted towards the channel occupancy limits because they provide subscribers with time diversity. While we recognize that time diversity is beneficial to consumers, we believe that congress was specifically concerned with ensuring that a diversity of programming sources is available to cable subscribers. We do not believe that this diversity objective would be well served by exempting multiplexed channels from the channel occupancy limits.

Further Notice, ¶ 218.

[6]Time shifting is the programming technique of scheduling the same programming on different multiplex channels at different times of the relevant programming period for the purpose of affording the viewer more opportunities to view a particular program.

Encore supports the Commission's tentative conclusion that only the particular system or systems which are vertically integrated with a video programmer should be subject to channel limitations, and that the limitations should apply only to the video programming services which are vertically integrated with that particular system or those particular systems. Any other conclusion leads to anomalous results. Suppose, for example, a cable system is owned by an independent operator, (i.e., not vertically-integrated). Should this operator be disallowed from selling to any MSO which is vertically-integrated simply because the independent operator has no channel occupancy limits, but, on sale, the vertically-integrated buyer is charged with the total of all vertically-integrated channels regardless of ownership? In short, the pool of potential buyers would exclude most MSO's. The loser is the independent operator. And, as the FCC noted in its Further Notice, such an interpretation provides a disincentive for MSO's to invest in programming to provide subscribers with more diversity as Congress intended. One cannot imagine any MSO overloading its channel lineups with the video programming offerings owned by another MSO. It simply defies reason.

The chief purposes for Congress' enactment of Section 11(c)(2)(B) was the concern that cable operators might have incentive to engage in anti-competitive practices, and a concern that a vertically-integrated cable operator might limit the "voices" available to subscribers to those controlled by the

vertically-integrated programmer. (See Further Notice at ¶168). As noted above, a vertically-integrated cable operator is unlikely to go out of its way to promote the wares of a competitor. The second concern is well-alleviated by limiting the scope of the channel occupancy limits to the same vertical ownership.

IV. CONCLUSION

Accordingly, Encore Corp. respectfully requests that the Commission (1) clarify its definition of "multiplexing" as set forth above; (2) count multiplexed services as a single channel; and (3) apply channel occupancy limits only to the attributable vertically-integrated programmers.

Respectfully submitted,

ENCORE MEDIA CORPORATION

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By _____
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